85-1001

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

Plaintiffs-Petitioners,

vs.

County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland,

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Supreme Court are as follows:

(1) Did the Eighth Circuit Court of Appeals err in determining that respondents' failure to provide petitioners with notice of a finding of child abuse, a statement of the basis for the finding of child abuse, notice of a right of appeal, and information on how an appeal could be pursued did not constitute a denial of petitioners' right to due process?

(2) Did the Eighth Circuit Court of Appeals err in determining that statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse were adequate to satisfy the due process requirements of the

Fourteenth Amendment?

(3) Did the Eighth Circuit Court of Appeals err in not allowing this case to proceed through discovery before determining that the statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse satisfied the due process requirements of the Fourteenth Amendment?

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Wayne Louis Bohn, et al. v. County of Dakota, et al., United States Court of Appeals for the Eighth Circuit, No. 84-5100, September 11, 1985.

GROUNDS FOR JURISDICTION

The judgment to be reviewed was issued by the Circuit Court of Appeals for the Eighth Circuit under date of September 11, 1985.

The statautory provision which confers jurisdiction upon this Court is 28 U.S.C. §2101.

STATEMENT OF THE CASE

Summary of Facts and Procedural History of Litigation

Petitioners Wayne Louis Bohn and Sharon Anne Bohn (hereinafter "Mr. and Mrs. Bohn") were licensed by the County of Dakota as foster parents. During the period December, 1979 to June, 1982, twenty foster children were placed in their home. Petitioners Bradley L. Bohn and Wayne Arthur Bohn (hereinafter "Brad Bohn" and "Wayne Bohn,Jr.", respectively, or, together with Mr. and Mrs. Bohn, "the Bohns", collectively) are Mr. and Mrs. Bohn's natural children, Wayne Bohn, Jr. having achieved majority age during the pendency of this proceeding and vacated Mr. and Mrs. Bohn's home.

On May 31, 1982 a scuffle occurred between Brad Bohn and his brother Wayne

Bohn in the back yard of the Bohn home. Mr. Bohn intervened to separate the two boys. Wayne Bohn became very upset and ran to a neighbor's house. After over two hours had elapsed and Wayne Bohn had not returned home, Mrs. Bohn called the City of Eagan Police Department and asked for assistance. A police officer went to the neighbor's home, but Wayne Bohn had left to take a walk. Later, another police officer went to the neighbor's home, and after unsuccesfully attempting to return Wayne Bohn to his home, took him to the police station. Wayne Bohn returned home later that evening when his father came to the police station for him.

Sometime the same day or after the police department filed a report with the Dakota County Department of Human Services. An "Assessment" social worker

with that department conducted an investigation. In the process she met with neighbors and associates of Mr. and Mrs. Bohn, teachers and friends of Wayne Bohn, and, without notice to Mr. or Mrs. Bohn, even removed Wayne Bohn from his classes at school to question him. She met once with Mr. and Mrs. Bohn, who came to her office on short notice. It was evident at the outset of this meeting that the assessment worker had already determined there had been physical abuse and she so advised the Bohns. The Bohns denied there had been any abuse and also expressed their opinion that the matter had been decided before the assessment worker had met with them.

On the basis ofthe assessment worker's investigation, the Department determined that there existed "substantiated evidence" of child abuse. The matter was

then referred to another unit of the Dakota County Department of Human Services, which unit assigned a Child Protection Worker to the Bohn family.

This Child Protection Worker met with Mr. and Mrs. Bohn several times, met privately with Wayne Bohn and Brad Bohn, and advised the family several times that Mr. Bohn had abused his son Wayne Bohn and that both were in need of treatment. During this period Mr. Bohn contacted the assessment worker's supervisor, stated that she was wrong and there had been no child abuse, and asked the supervisor to review the assessment worker's determination. The supervisor, Mr. Anthony Bibus, refused to change the assessment worker's determination and stated that if Mr. Bohn would cooperate and accept counseling there would be no adverse consequences. Mr. Bohn continued

to deny there had been child abuse and refused the suggested treatment. He asked how he could appeal the Department's determination and was told by Mr. Bibus there was no right of appeal.

On June 4, 1982, four days after the alleged physical abuse, Wayne Bohn was examined by a licensed physician, who found no evidence of physical abuse and wrote a report to that effect. A copy of this report was sent to the Assessment worker, but she refused to consider it since she had already made her determination. On June 14, 1982, Wayne Bohn wrote a letter to the Assessment worker denying that he had ever been abused by his father or that he had said anything to support such a finding. The Assessment worker received this letter, but disregarded it on the assumption that

Wayne Bohn had been forced to write it.

Dakota County never charged Mr. or Mrs. Bohn with neglect or dependency, nor did they initiate any action in Dakota County Juvenile Court, nor take any action to protect Wayne Bohn from the alleged danger from his father or remove him from his home, where he resided until he graduated from high school and joined the U.S. Marine Corps over two years later. After a few visits to the Bohn home by the Protection worker and continued denials by the Bohn family that there had been abuse of Wayne Bohn, and refusal to agree to take counseling (at the family's expense), the County dropped the case, except to continue to regard and treat Mr. Bohn as a child abuser.

The finding of child abuse resulted in the de facto revocation of Mr. and Mrs. Bohn's foster care license. All of the

foster children in the Bohn home at the time of the finding were immediately removed and none others have been placed there since. This was done without a hearing.

In February, 1984, over two and one-half years after the May 31, 1982 incident, and approximately six months after the Bohns filed a Section 1983 action, the County initiated a proceeding to revoke the Bohns' Family Foster Care License. Eventually a hearing was held in May, 1985. The Administrative Judge concluded that the Assessment Worker made a mistake and that there had been no child abuse. He recommended to the Minnesota Commissioner of Human Services that the Bohn Family Foster Care license not be revoked. Dakota county appealed that recommendation to the Commissioner of Human Services where the matter is

still pending. However, Mr. Bohn is still shown in Dakota County records as a child abuser and the Bohn foster care license, although not formally revoked, has been regarded by Dakota County as revoked. Since May 31, 1982, Dakota County has not placed any foster child in the Bohn home.

In addition, the Bohns lost the friendship and companionship of fellow foster parents since they were no longer invited to foster parent functions and since other foster parents, after learning of the child abuse finding, alienated themselves from the Bohns. Word of the alleged child abuse was communicated to the Bohns' neighbors and to Wayne and Brad Bohn's friends . Their reputation was put in disrepute.The Bohns found themselves literally ostrasized by the community. Both of the Bohn children

found the atmosphere at public school so changed that they were enrolled in and completed their high school educations in a private school. The parent-child relationship was severely strained for a long period by the child abuse allegations. And, of course, the family experienced feelings of embarrassment and humiliation as a result of the finding of child abuse and as a consequence suffered much mental distress.

It is interesting to note that long before initiating their Section 1983 action, Mr. and Mrs. Bohn asked the County to initiate a proceeding to revoke their foster care license to provide them a forum and an opportunity to disprove the child abuse finding. The County refused to do this. It was not until the Section 1983 action was initiated that the County, in what the Bohns

believe was retaliation, commenced formal revocation proceedings.

Mr. and Mrs. Bohn were never given any written notice of the finding of child abuse or a statement of the basis for that finding. Mr. and Mrs. Bohn were never advised of any right to have the finding of child abuse reviewed or to appeal the finding of child abuse or the means by which such a review or appeal could be obtained. On the contrary, they were advised by the Dakota County Department of Human Services and others that there was no right to appeal the finding of child abuse or to have it reviewed and no means or procedures were available for such a review or appeal.

Despite this advice, Mr. and Mrs. Bohn, acting on their own and through their attorney, made many attempts and took many actions to obtain a review or

appeal of the finding of child abuse or to disprove it and restore themselves to their former situation. These actions consisted of the following:

1. During the period June 4, 1982 to June 15, 1982, Mr. Bohn, independently, and through counsel, made several verbal and written denials of the finding of child abuse and requested an opportunity to demonstrate the inaccuracy of the finding. The reply of the Department of Human Services to each request was that the finding was final and not subject to review or appeal.

2. Following these denials, Mr. and Mrs. Bohn initiated an action in Dakota County Juvenile Court and participated in a hearing on July 9, 1982.

3. In a letter dated June 25, 1982, to the Judge of Dakota County Juvenile Court with a copy to the Assistant Dakota

County Attorney County, the Bohns advised of the damage being caused the family as a result of the child abuse finding and of the need for a method of resolving the matter. There was no reply.

4. At the Juvenile Court hearing on July 9, 1982, the Assistant Dakota County Attorney asserted that the correct procedure for the Bohns to pursue to challenge a finding of child abuse was an appeal under the "Fair Hearing Act". A few days after the hearing, the attorney for the Bohns telephoned a referee in the Appeals Division of the Minnesota Department of Public Welfare. This individual stated that he did not believe there was any way to appeal a finding of child abuse but suggested sending a letter requesting a hearing.

5. The Bohns'attorney wrote such a letter on July 15, 1982. By letter dated

July 26, 1982, that agency advised that it lacked jurisdiction to review the matter. There was no information on an appeal procedure. The Bohns notified the Judge of Juvenile Court and the Assistant Dakota County Attorney, by letter dated August 6, 1982, of the Department of Public Welfare's determination.

6. The Dakota County Juvenile Court advised by letter dated September 2, 1982, that it refused to accept the Petition submitted by the Bohns' attorney. The Dakota County Juvenile Court's decision was appealed to the Dakota County District Court, which without any hearing, affirmed the action of the Juvenile Court. The District Court, in its Order of Dismissal, stated "more appropriate procedures were available." By letter dated December 6, 1982, to the District Court Judge, a copy of which was

sent to the Dakota County Assistant County Attorney, the Bohns' attorney asked that the procedures referred to be identified. There was no reply.

7. In approximately October, 1982 the Bohns solicited the assistance of the Commissioner of Dakota County elected from their district who is also a member of the Dakota County Human Services Board. A meeting between Mr. and Mrs. Bohn and that Commissioner took place at the Bohn home. The Commissioner later wrote Mr. and Mrs. Bohn and advised them that he had met with a member of the Dakota County Attorney's office and could not pursue the matter because it was in litigation. Here again, although Mr. and Mrs. Bohn voiced their desire to appeal the finding of child abuse, they were provided no information concerning the procedure for initiating such an appeal

8. By letter dated December 15, 1982, the Bohns' attorney submitted a Petition to the Dakota County Human Services Board asking the Board to take action to give the Bohns a hearing on the child abuse allegations. The County Administrator advised by letter dated January 5,1983, that the Dakota County Attorney's office would not allow the Board to take any action. In a reply letter dated January 7, 1983, Mr. and Mrs. Bohn advised officials of Dakota County of the serious damage caused by family by the chld abuse finding.

9. The Bohns appealed the decision of the Dakota County District Court to the Supreme Court of the State of Minnesota. In a Memorandum of Law submitted in January, 1983, to state Supreme Court the attorney representing Dakota County referred to the Minnesota statutes

concerning the review of private data maintained by a department as providing the means of appealing a finding of child abuse. This was the first information provided by the County concerning a means of appeal. There was no mention of any administrative procedures or of the Minnesota Code of Agency Regulations (MCAR).

10. At a Pre-Hearing Conference in January, 1983, a Justice of the Minnesota Supreme Court in an informal conversation agreed that he did not know of a means by which a finding of child abuse could be appealed. He suggested the possibility of a Section 1983 action. The Bohns agreed to dismiss their appeal of the District Court decision.

11. Following the pre-hearing conference, the Bohns immediately attempted to pursue the procedures made known to them

by the County. In a letter dated January 20, 1983, to the Director of the Dakota County Human Services Department, Mr. and Mrs. Bohn took the first step by requesting that they be furnished copies of certain data.

12. By letter dated February 7, 1983, an Assistant County Attorney of the Dakota County Attorney's office advised that relevant files had been gathered and were available for review. On February 15, 1983, Mr. and Mrs. Bohn and their attorney traveled to the location of these documents in Hastings, Minnesota to review the documents. By letter dated February 24, 1983, Mr. and Mrs. Bohn advised the County of the documents they wished to have copies of and paid $53.05 for these copies.

13. By letter dated April 29, 1983 the Bohns identified four documents in the

files of the Dakota County Department of Human Services and asked that certain portions of those documents be changed to state and conclude that Mr. Bohn did not abuse his son Wayne Bohn. Approximately one month later, by letter dated May 27, 1983, the Director of Dakota County Human Services replied stating that the documents referred to were accurate and would not be changed. There is no mention in this May 27, 1983 letter of any right to appeal the determination not to change the Department's documents nor of the means by which an appeal could be pursued.

14. By letter dated January 7, 1983, a copy of which was furnished to the County Attorney of Dakota County and the Dakota County Commissioners, the Bohns sought the assistance of their state representative. He did not provide any.

15. By letter dated June 10, 1983, the Bohns made a final appeal to the Dakota County Human Services Board asking once again that they be given the opportunity to disprove the finding of child abuse. There was no reply.

Thus, Mr. and Mrs. Bohn and their attorney did everything within their knowledge and power to obtain a review of or appeal the finding of child abuse. The County and their attorneys, although very much aware of the Bohns' disagreement with the child abuse finding and their all-consuming desire to disprove the finding, provided no written or oral information on the procedures which have since been discovered and which they now contend Mr. and Mrs. Bohn could have utilized. It seems apparent that Dakota County's attorneys were similarly unaware of the procedures pertaining to an appeal

of a finding of child abuse until these procedures were accidentally discovered in February, 1984. The accidental discovery of the procedure resulted when counsel for the Bohns, in response to the County's contention that a child abuse finding could be appealed to the Minnesota Office of Administrative Hearings, wrote to that office to demonstrate that there existed no right of direct appeal. The reply of that office confirmed that there was no direct right from an agency finding of child abuse. That same reply, however, went on to disclose the administrative regulations concerning such an appeal. It was at this time that the Bohns and their attorney first learned of the procedures contained in the Minnesota Code of Agency Regulations (MCAR). Mr. and Mrs. Bohn and their attorney have contended and still contend that it was

not reasonably possible to learn of these procedures by any reasonable means, particularly since at the time there was no index to the MCAR, no cross reference tables, and there is no requirement that the subject of a finding of child abuse be advised of any appeal rights.

The process in Minnesota concerning the reporting and investigation of suspected child abuse and appealing a finding of child abuse which was finally discovered by Mr. and Mrs. Bohn, their attorney, and Dakota County in February, 1984, and with which Mr. and Mrs. Bohn take exception, is as follows (the statutes and regulations referred to are reproduced as part of the appendix hereto):

1. Minnesota Statutes §626.556 requires reports of suspected child abuse from certain persons, such as doctors, teachers, child care workers, etc., and

authorizes voluntary reports by all other individuals. An individual making a report of child abuse is immune from civil or criminal liability unless it can be shown that a false report was made "willfully or recklessly". Under the statute, the name of a person making a report of suspected child abuse cannot be disclosed except upon court order.

2. Under the statute, the local welfare agency is directed to immediately investigate a report of suspected child abuse and "offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." (Subd. 10).

3. Such an investigation is conducted by interviewing the individual making the report and others who have had contact

with the child. These investigations normally are conducted without notice to the alleged child abuser or notice to the parents of the allegedly abused child. The alleged child abuser and the parents of the allegedly abused child are not told the names of the person or persons who reported child abuse and not necessarily told the details of the information reported.

4. When the investigation is completed, the social worker makes a determination that the report of child abuse has or has not been "substantiated". If it is determined that the report of child abuse has been substantiated, another social worker is immediately designated to provide services to the family. There is no written notice or report given the alleged child abuser or the family that there has been a finding of child abuse.

The alleged child abuser and the parents are not given any notice of any right to have a finding of child abuse reviewed or to appeal such a finding, and, in fact, they are normally told that the finding is final and there is no right of review or appeal.

5. Minnesota Statutes §626.556, makes no mention of any right to appeal a finding of child abuse or the procedure for initiating such an appeal. The only hint of such a right is in Subdivision 11 of that statute, entitled "Records" which states that a record of a report of child abuse is to be maintained as "private data." Subdivision 11 further provides that "the records shall be collected and maintained in accordance with the provisions of sections 15.1611 to 15.1699." However, §§15.1611 to 15.1699 have been renumbered and relocated in

their entirety and are now found at Chapter 13. Section 15.1699, the statute pertinent hereto, is found at §13.04.

6. Reading §13.04 still would not disclose the right to appeal a finding of child abuse. Rather, the investigator would learn that the subject of any private data record has the right to ask the "Responsible Authority" that such documents be disclosed to him. In order to obtain disclosure, the subject of the document must make written application and must describe the documents he wishes to see. The "Responsible Authority" may or may not agree to allow the investigator to review documents. If the "Responsible Authority" refuses, the subject of the data can petition the state district court for an order compelling the "Responsible Authority" to make the documents available for review. If the

"Responsible Authority" agrees to allow review of the records described, or is ordered by the district court to allow such a review, documents can be reviewed at the location where they are stored and copies of the documents can be purchased. The typical price is $.50 per page. With respect to documents reporting child abuse, the documents are first modified by deleting names and other information.

7. The alleged child abuser can contest the accuracy of the records. To do this, the individual writes the "Responsible Authority" describing his disagreement with the record and requesting that it be corrected. The "Responsible Authority" has 30 days in which to reply. If the "Responsible Authority" refuses to change the record, and hence the finding of child abuse, then "the determination of the responsible authority may be appealed

pursuant to the provisions of the Administrative Procedure Act relating to contested cases." The statute does not say what that procedure is or where it can be found.

8. A "procedure for contested case" is set forth in Minnesota Statutes §§14.57 through 14.61. However, the statutes provide that only an agency can initiate a contested case proceeding. There is another process set forth in Minnesota Statutes §14.63 through 14.70 for judicial review of a contested case decision. Unfortunately, neither of these statutes offers any guidance as to how a contested case procedure is initiated, that is, how an individual can get access to the process.

9. Not revealed in the statutes, or in any note or cross-reference, there are provisions in the MCAR specifying the

procedure by which an individual can appeal a determination of a "Responsible Authority" not to correct a private data records. Those provisions are set forth in 2 MCAR §1.215. Unfortunately, it has been virtually impossible to find material in the MCAR (recently redesignated "Minnesota Rules"). There was previously no index to this set of rules and there is no table of cross references by which an individual can find any provisions implementing a statute.

The process described above is by any measure complicated, cumbersome and time consuming. And, it must be remembered that all during this time, the agency has involved itself with the family by providing "protective services". The family must contend with the agency's assertion to their child, the child's teachers and others, that the child is

abused. Further, if the alleged child abuser pursued the procedure described above, and eventually obtained a hearing before a Hearing Examiner at the Minnesota Office of Administrative Hearings, as provided for in 2 MCAR §1.215, he would find that he has the burden of disproving the finding of child abuse. This is established by the Rule in 9 MCAR §2.217, subp. 5.

If the opportunity were given, it could be proven that in all the years since 1975 when the child abuse reporting statute, Minnesota Statutes §626.556, was enacted, there has yet to be a single proceeding at the Office of Administrative Hearings contesting a finding of child abuse under the procedures described above. It also could be shown that since 1975, there have been thousands of findings of child abuse. It is unbeliev-

able that in all of those cases there is not a single erroneous finding of child abuse, or that there were no instances when the alleged child abuser disagreed with the finding. What is evident is that the lack of notice of a right of appeal and information on the appeal process, together with a complicated and cumbersome process has led to unbridled power by human services departments, or comparable agencies, to find child abuse and intrude into a family's affairs to provide "protective services."

Mr. and Mrs. Bohn contend that simple fairness as well as public interest require that whenever there is a finding of child abuse, the alleged child abuser should be notified in writing of a right of appeal, advised on how that right of appeal may be exercised, and provided a quick, simple and inexpensive procedure

for exercising the right of appeal.

If no inquiry is made as to the practicalities of locating and implementing the above procedure, one might erroneously conclude, as the District Court and Court of Appeals did, that the procedure satisfies due process requirements. The procedure appears -- on paper -- to provide due process. However, in determining whether the procedure afforded under Minnesota law satisfies due process requirements in this case, one must consider and appreciate the environment under which the Bohns and their attorney were operating during the relevant time period. The procedure that eventually materialized had never been used and was a mystery to everyone involved -- including the attorneys for Dakota County. The Bohns and their attorney were continually advised that no proce-

dure for appealing the child abuse finding existed and, because the procedure was hidden in an unindexed code of regulations, their efforts to uncover a procedure failed to disprove this advice. When the procedure was eventually uncovered by accident, the County suddenly adopted the position and convinced the Court that the Bohns and their attorney should have known of the existence of the procedure. In addition, not only is the procedure difficult and, in fact, practically impossible, for the lay person to locate, it is cumbersome and expensive to implement.

In order to put the appeal procedure as described above and the County's attitude with respect to child abuse in the proper perspective, mention is made here of a copyrighted article which appeared in a November 1985 issue of the Minneapolis

Star and Tribune entitled, "Child Protection System Said Out of Control." In that article, the former director of the National Center on Child Abuse states, with respect to the phenomenal increase in reported child abuse cases, that such statistics are often used to obtain funding, titilate the public and aid in the passage of new child protection laws. However, as the article continues, 60 to 70 percent of reported cases are unfounded.

The Basis for Federal Jurisdiction

The basis for original federal jurisdiction in this matter, specifically, the United States District Court for the District of Minnesota is that the matter was brought under a federal statute, specifically 28 U.S.C. §1983, and the amount in controversy exceeds $10,000.

ARGUMENT

(1) The Eighth Circuit Court of Appeals erred in determining that respondents' failure to provide petitioners with notice of a finding of child abuse, a statement of the basis for the finding of child abuse, notice of a right of appeal, and information on how an appeal could be pursued did not constitute a denial of petitioners' right to due process?

The thrust of the Bohns' argument is that persons who have been the subject of an investigation and have been found to have abused their child should be provided notice of the available procedure for appealing the finding. Without such notice, alleged child abusers acting on information provided by Government officials and because of the obscurity of the procedures could reasonably assume that no procedure exists for appealing the finding. A simple notice, similar to that provided in the revocation of foster parent licenses, would succeed in

alleviating this misconception.

The Eighth Circuit Court of Appeals, in its September 11, 1985 opinion, determined that interests protected by due process requirements existed in this case. Specifically, the Court said: "The privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible interests which due process protects." In addition, the Court stated, "Bohn's reputation is a protectible interest." Thus, since it has already been answered in the affirmative, the question of whether a protectible interest exists in this case will not be addressed herein.

In Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), the Supreme Court discussed the criteria for determining when due process required giving notice

of an action and information on how the action may be disputed. The Court held that before a municipal utility could terminate utility services, a customer was entitled to notice of the proposed action, notice of the means for disputing the proposed termination of service, and the opportunity to present their objections and commented that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 26 L.Ed.2d 287 (1970), the Supreme Court held that welfare benefits could not be terminated without a prior adequate hearing, and that adequate notice was required for due process.

The rights of notice and opportunity to

be heard as part of due process was discussed extensively in Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 729 (1975), where the Supreme Court held that due process requires, in connection with a suspension of ten days or less, that a student be given notice of the charges against him and, if he denies them, an opportunity to present his version.

The three-judge Federal District Court panel in Dublino v. New York State Department of Social Serv., 348 F.Supp. 290 (D.C.W.D.N.Y., 1972) reversed, 413 U.S. 405, ruled, inter alia, that even though procedures had been promulgated giving an individual a right to a hearing before termination of benefits, such a right was not enough if the individual was not given adequate notice.

A three-judge Federal District Court

panel held in Sims v. Juras, 313 F.Supp. 1212 (D.C.D.Ore., 1969) that due process was violated by regulations authorizing and requiring termination or suspension of public aid prior to a hearing. The Court declared that due process under the Fourteenth Amendment required the following in relation to welfare:

> "Written notice to the recipient that his grant is proposed to be terminated or suspended, . . .
>
> "Of the reason or reasons for the proposed action . . .
>
> "That he will be afforded upon request an opportunity for hearing . . .
>
> "Of the method by which he may obtain a hearing . . ."

In Ryan v. Shea, 394 F.Supp. 894 (D.C. Colo. 1974), disability benefits for certain persons were terminated on the basis of changed eligibility requirements. The court held that such termination of benefits was in violation of the

requisites of procedural due process in that the notice of termination was inadequate in not stating plaintiffs' rights to dispute the determination through an evidentiary hearing prior to termination.

In Atwater v. Roudebush, 452 F.Supp. 622, at 630 (D.C., N.D.Ill. E.D., 1976) the court stated:

> "At a minimum, the recipient (1) should be given access to information relied upon by the agency as the reasons for its decision, and to a summary of the evidence upon which the decision is based, (2) should be given an opportunity to submit additional evidence or arguments in written form challenging the agency action prior to a final decision, and thereafter (3) should be informed of his right to an administrative review. None of these safeguards were present in this case. Instead, Atwater only received an informal oral conference with an agency official who explained the consequences of a decision that had already been made."

In Bryant v. D'Elia, 77 App.Div.2d 590, 430 N.Y.S.2d 103 (1980), an arrange-

ment existed whereby the Department of Social Service made shelter allowance payments directly to the bank holding the mortgage on plaintiff's home. The Department terminated payments causing plaintiff's mortgage payments to fall substantially behind and resulting in the commencement of foreclosure proceedings by the bank. The County argued that the plaintiff should not be allowed to contest the discontinuance since her request for a fair hearing was not made within the time limits set by statute. The court ruled that plaintiff's testimony that she never recevied notice of the discontinuance with notice of her right to a fair hearing overcame evidence that notice was properly provided and decided against the county's argument.

In Turner v. Walsh, 435 F.Supp. 707 (W.D. Mo. 1977) the court agreed with

plaintiff's assertion that notice of termination of benefits was defective and failed to meet Fourteenth Amendments standards "because it fails adequately to inform recipients of their right to a hearing to contest the intended action and to obtain continued benefits pending that hearing or a determination following it." (435 F.Supp. at 711)

In Deary v. Guardian Loan Co. Inc., 434 F.Supp. 1178 (S.D.N.Y. 1982) the court held that New York post-judgment enforcement procedures violated the due process clause because judgment debtors were not given notice of and an opportunity to challenge restraint or execution. The defendants in that action contended that notice had been given the judgment debtors by forms sent to them. In an exhaustive discussion citing substantial authority the court found such form

notice insufficient declaring that "without appropriate notice, the provisions of post-enforcement remedies cannot satisfy constitutional requirements." (534 F.Supp. at 1188)

The County's position with respect to notice from the outset has been that there is no obligation to furnish notice of a right of appeal or information on the procedure for taking an appeal. However, as the foregoing authority demonstrates, notice of appeal procedures is required in similar situations when an individual may not be aware of a right of appeal and may not seek legal counsel. The Bohns submit that the rationale applied in the cases discussed hereinabove is equally applicable to their situation, and any situation in which an individual is accused of child abuse. The enormity of the possible repercussions of

such an accusation on the stability of one's family require that every precaution possible be taken to assure the continued stability of family units.

(2) The Eighth Circuit Court of Appeals erred in determining that statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse were adequate to satisfy the due process requirements of the Fourteenth Amendment?

The procedures for disputing a finding of child abuse that the County contends are adequate are not simple, inexpensive, speedy or suitable. As shown in the foregoing Statement of the Case, several steps are required merely to learn the basis of the finding. To obtain that information a person must (1) identify records he desires to review; (2) wait until the agency has gathered the records and determined if they will be made available for review and modify

records to eliminate names and other information; (3) visit the location of the records if permitted to review them (or initiate a court action or obtain review if the Responsible Authority refuses review); (4) pay for copies which are then made and sent; (5) write to the Responsible Authority requesting correction of inaccuracies in the records; and (6) wait for the reply of the Responsible Authority. These steps (which were taken by the Bohns in this proceeding) can be expected to take at least ninety days. Even then the alleged child abuser is not entitled to know the names of the witnesses without instituting a separate court action with additional expense and delay. At this point there still has been no hearing. If the Responsible Authority refuses to change the records, the alleged child abuser can initiate an

appeal (if he has been advised of or discovers the process). This requires an appeal to the Administrator of the Department of Administration (who reportedly has delegated the responsibility to the Commissioner of Public Welfare), who in turn refers the matter back to the local agency, who then refers the matter to the Office of Administrative Hearings, which then schedules a hearing at some time in the future. Even at this point, the alleged child abuser does not know the names of his accusers and therefore cannot subpoena them or cross-examine them. To obtain this, he would have to initiate and pursue a separate court proceeding and a judge may or may not order the agency to release the names of the accusers.

All during this time, the agency proceeds on the basis that the finding of

child abuse has been substantiated. If the individual involved is a foster parent, foster children are removed and the foster parent license is constructively suspended. A Child Protection Worker is assigned and meets with the alleged child abuser and the allegedly abused child to provide protective services -- whether or not such services are wanted and regardless of the damage and disruption caused the family.

In Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), the Supreme Court struck down an Illinois procedure for determining allegations of discrimination as not adequate to satisfy due process, and declared that the Fourteenth Amendment requires an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the

nature of the case.

In Ciechon v. City of Chicago, 686 F.2d 511 (CA 7, 1982), the Seventh Circuit described in substance due process requirements as requiring a fair proceeding and procedural safeguards which require proper notice and an opportunity to be heard.

In Brennan v. Occupational Safety and Health Review Commission, 505 F.2d 869 (CA 10, 1974) it was said:

> "A statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process." (citations omitted)

In Hayes v. Cape Henlopen School District, 341 F.Supp. 823 (D.C.Del., 1972), the Court found that the administrative remedy available to the plaintiffs was not adequate and, therefore, that plaintiffs were not precluded from

maintaining their Section 1983 action. The Court evaluated the administrative remedy that defendants in that action said was available to plaintiffs and stated as follows:

> "In addition, to be adequate, the procedures must be sufficiently delineated either through statute, regulations or practice to permit the individual and his attorney to accurately assess their responsibilities and opportunities within the administrative process and the probable efficacy of that process. No evidence is available on the record to indicate that such definitive description of procedures either prior to Mrs. Hayes' request for a hearing or in response to that request. * * * In these circumstances, the Court is of the opinion that the available administrative procedures were not sufficiently enumerated to meet the standard of adequacy appropriate to evoke the exhaustion doctrine."

The Bohns believe it is evident that the procedures said to be available to challenge a finding of child abuse are not clear or readily available, do not provide simple, inexpensive, speedy or

suitable remedies, and, hence, do not meet the Fourteenth Amendment standard of due process.

(3) The Eighth Circuit Court of Appeals erred in not allowing this case to proceed through discovery before determining that the statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse satisfy due process requirements of the Fourteenth Amendment?

Mr. and Mrs. Bohn submit that the District Court should have conducted an investigation to determine if the procedures that were allegedly available to them were in fact adequate. In support of this contention, Mr. and Mrs. Bohn cite Coleman v. Faulkner, 697 F.2d 1347, at 1349 (10th Cir. 1982), where a district court decision dismissing a section 1983 action for failure to state a claim upon which relief could be granted was reversed without oral argument. The Court stated as follows:

"While the Oklahoma statute appears on its face to provide due process, Mr. Coleman asserts that he has no way to avail himself of the remedy it provides. He alleges that he is indigent and cannot retain counsel, that the state will not provide him with counsel for such a proceeding, and that prison officials will not permit him to appear in court on his own behalf.

"The trial court did not consider Mr. Coleman's allegation that the remedy provided by the state is constitutionally insufficient for an indigent prisoner. If that allegation is true, Mr. Coleman has stated a cause of action under section 1983.

A similar decision was rendered in Cofone v. Manson, 409 F.Supp. 1033 (D.C.D.Conn., 1976), in which the Court considered an inmate's challenge of procedures adopted by the Department of Corrections for screening incoming mail. In determining that the appeal procedures of the Department of Corrections did not meet the due process standards of the Fourteenth Amendment, the court said:

> "Before the court below may relinquish its §1983 jurisdiction, it must, on the most narrow eading of the cases, be positively assured--it may not presume--that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record."

It is the Bohns' position that the District Court and the Court of Appeals erred in determining that the procedure provided under Minnesota law for appealing a finding of child abuse affords due process, without first allowing the Bohns to engage in discovery and to develop further evidence in support of their contentions. The Bohns have contended that the procedure provided under Minnesota law is violative of due process because it is cumbersome, burdensome and fails to require notice of the basis for the finding or the appeal procedure available. The procedure itself has

never been used in the ten years since the existing child abuse reporting statute was enacted and, thus, has never been tested. How, therefore can the court make an arbitrary determination that the procedure affords due process? The very fact that the procedure has never before been employed reasonably leads to the conclusion its obscurity has prevented its disclosure and, therefore, that it is violative of due process requirements. Without more information as to its practical implementation and ability to provide due process it cannot be said with precision that it in fact does provide due process.

In appraising the sufficiency of a complaint the accepted rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief [Conley v. Gibson, 78 S.Ct. 99, 355 U.S. 41, 2 L.Ed.2d 80 (1957)]. More specific to the case at bar is the rule that "A complaint under 42 U.S.C. § 1983 charging denial of constitutional rights by a state agency may not be dismissed for lack of jurisdiction unless it appears that the claim is frivolous or wholly insubstantial "[Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); Oneida Indian Motion v. County of Oneida, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed.2d 939 (1946)]. For jurisdictional purposes the test is whether the complaint on its face is so plainly insubstantial as to be devoid of any merit and thus not presenting any issue worthy of adjudication. [

Guillini v. Blessing, 654 F.2d 189 (2nd Cir., 1981)]. The Bohns submit that this certainly was not true in the case at bar.

In Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2nd Cir., 1980), a Section 1983 suit for damages arising out of the plaintiff's discharge as director of neighborhood corporation, it was held as follows:

> "Thus, where an infringement of a constituitionally protected interest in 'liberty' is alleged, it is essential that a litigant be afforded a reasonable opportunity to prove facts which, taken together, state a claim. Summary dismissal of alleged Fourteenth Amendment violations based on deprivations of this interest, therefore, is appropriate only when prior case law leaves no doubt that the defendant must prevail as a matter of law. In the instant case, we hold that the district court granted summary judgment prematurely and denied plaintiff a meaningful opportunity to prove that his liberty interest has been unlawfully infringed."

Finally, Katris v. City of Waukegan,

498 F.Supp. 48 (N.D.Ill.E.D., 1980), is a case which closely parallels the case at bar. In that case, a Section 1983 action, the plaintiff asserted that his application for a liquor license was improperly refused by the City of Waukegan without a statement of the reasons therefore and without a hearing. Specifically, the plaintiff contended that the procedure in effect which provided for de novo review by the state commission of liquor license applications failed to satisfy due process requirements because it failed to provide for "(a) standards governing mayoral discretion in evaluating 'good character and reputation in the community'; (b) notice to an applicant of denial, revocation or renewal of a liquor license; (c) a statement of reasons why an applicant is denied a liquor license; (d) a right to a

hearing on denial of a license; and (e) a right to appeal a mayoral decision denying a license to another decision-making body." These are almost precisely the same procedural safeguards sought by the Bohns in the case at bar.

As in the case at bar, the defendants in Katris moved to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. After concluding that the plaintiff's interest in the liquor license constituted a property interest recognized and protected by Section 1983, the Court denied defendants' motion to dismiss as follows:

> "Ordinarily, a rejected applicant for statutorily authorized governmental benefits is given notice and an opportunity to respond to evidence against him.
>
> * * *
>
> "One procedural protection which is particularly important when a governmental benefit is denied in the

first stage of an administrative procedure is the right to a statement of reasons why the application was rejected.

* * *

"However, the city was constitutionally required at least to mandate a procedure through which the plaintiff was furnished a statement of reason why his application was denied, and to advise him of his right to appeal. Basic procedural fairness is required at all levels of government.

* * *

"The conclusion that the state must provide fundamentally fair procedures at every 'administrative proceeding of a judicial nature.' Hornsby v. Allen, supra, also accords with the general rule that a plaintiff need not exhaust his state judicial or administrative remedies before filing a federal civil rights action. (citation omitted)

"For the reasons stated above defendant City of Waukegan's motion to dismiss was denied."

Certiorari Should be Granted

It is thus submitted by Mr. and Mrs. Bohn and the rest of their family, that the Court of Appeals erred in arbitrarily

determining that the procedure currently in effect in Minnesota for appealing a finding of child abuse satisfies the due process requirements of the Fourteenth Amendment. As has been demonstrated above, the procedure, due to its obscurity and difficulty in implementation, does not provide due process. Accordingly, the Bohn family respectfully requests that certiorari be granted to permit them the opportunity to more fully demonstrate this.

Dated: December 9, 1985

Respectfully submitted,

Dale C. Nathan

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No. ___

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

Plaintiffs-Petitioners,

vs.

County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland, .

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)ss.
COUNTY OF DAKOTA)

Dale C. Nathan, being first duly sworn, upon oath, deposes and says that he offers this Affidavit of Service in accordance with Rule 28 of the Rules of the Supreme Court of the United States; that he is an attorney at law with offices a 3435 Washington Drive, Suite 200, Eagan, Minnesota; that on the 9th day of December, 1985, he served the attached Petition for Writ of Certiorari and Appendix on the the following person by placing a copy thereof in a package properly addressed as follows:

Douglas J. Muirhead
Meagher, Geer, Markham, Anderson,
Adamson, Flaskamp & Brennan
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

which address is the last address of said

Douglas J. Muirhead known to him, and the package with postage prepaid was deposited by him in the U.S. Mail at Eagan, Minnesota for delivery by the U.S. Post Office Department as directed by said package.

Dale C. Nathan

Dale C. Nathan

Subscribed and sworn to before me this 9th day of December, 1985.

Notary Public

LYNDA J. NELSON
NOTARY PUBLIC - MINNESOTA
DAKOTA COUNTY
My Commission Expires Sept. 22, 1987